application for injunction also fails.

3) *For stay of execution of the Order of dissolution of injunction given on January 16, 1985:*

The principle in granting a stay of execution is that:-

"the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it." *Serangoon Garden Estate Ltd.* v. *Ang Keng*(3).

In *Leong Poh Shee* v. *Ng Kat Chong*(4) Raja Azlan Shah J. (as he then was) held that special circumstances must constitute something distinctive and out of the way.

The only ground given in applicants' affidavit for stay of execution is that the plaintiffs have filed an appeal to the Supreme Court against the order of January 16, 1985.

An appeal is not such ground as constitute special circumstances unless there are merits in the appeal – see *Serangoon Garden Estate's* case (*ibid*).

In *Aab Singh* v. *Jeffrey Fernandez*(5) Yong J. referring to *Shaw* v. *Holland*(5) quotes:–

"the proceedings under a judgment should not be stayed pending an appeal unless on special grounds."

There are no special grounds in this application except the appeal pending the merits of which have been discussed above.

In my view, the application should be dismissed.

All the three applications by the plaintiffs are therefore dismissed with costs.

Application dismissed.

Solicitors : *Jackson & Masacorale; Chua Brothers, Azzat & Xavier.*

INDRAN & ANOR. v. PUBLIC PROSECUTOR

[R.Cr.J. (Peh Swee Chin J.) February 15, 1985]

[Seremban – Petition for Criminal Revision No. 7 of 1984]

Criminal Law and Procedure – Preliminary inquiry – Nature and quantum of evidence to enable Magistrate to commit an accused person for trial – Confession of co-accused – Evidence Act 1950, s. 30 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 139, 140 & 141.

In this case the applicants had been committed for trial on a charge of murder. The only evidence implicating the applicants came from the respective cautioned statements of two other persons accused in the same case. It was argued that the cautioned statements were exculpating to the makers and did not amount to confessions and section 30 of the Evidence Act was not applicable. Even if they were confessions and section 30 of the Evidence Act applied, it was argued that they could only be considered against the applicants and that there was no *prima facie* case against the applicants to be committed for trial. The prosecution submitted that the cautioned statements would form part of the prosecution case and the weight of such evidence would be for the jury and not the committing Magistrate to consider. An appeal by the applicants was dismissed on the ground that the said order of committal was not appealable. The applicants applied for revision.

Held: (1) if at the preliminary inquiry there is credible evidence, which if believed but subject to all possible lines of defence may end in a conviction, the inquiring Magistrate has no option but to commit the accused person for trial;

(2) the evidence of the cautioned statement of the other two accused in this case, is credible evidence which if believed and subject to all possible lines of defence, including one of frailty of such evidence may result in a conviction. The order for committal must therefore be confirmed;

(3) an inquiring Magistrate does not determine guilt or innocence and the expression "sufficient grounds for committing the accused for trial" does not denote a case proved beyond a reasonable doubt.

Cases referred to:-

(1) *Public Prosecutor* v. *Nordin bin Johan* [1983] 2 M.L.J. 221.
(2) *Lim Yow Choon* v. *Public Prosecutor* [1972] 1 M.L.J. 205.
(3) *In re Pang Poh Pah* [1985] 2 M.L.J. 214.
(4) *Re Osman bin Abdullah* [1954] M.L.J. 237.
(5) *Soo Sing & Ors.* v. *Public Prosecutor* [1951] M.L.J. 143.
(6) *Tan Ah Ting* v. *Public Prosecutor* [1974] 2 M.L.J. 37.
(7) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49.

PETITION FOR CRIMINAL REVISION.

J. Nadchatiram for the applicants.

Mohamed Zaki bin Mohamed Yassin (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Peh Swee Chin J. : This application raises a rather vexed question as to the nature and quantum of evidence which will enable an inquiring magistrate in a preliminary enquiry to find that there are sufficient grounds for committing an accused person for trial to the Court of a Judge.

The applicants are two of the four accused persons who have been so committed at the conclusion of a preliminary enquiry at Port Dickson Magistrate's Court. The same applicants had lodged earlier an appeal against the relevant order for committal in Seremban High Court Criminal Appeal No. 87 of 1983, and it was dismissed on the ground that the said order of committal was not appealable. Not being willing to resign themselves to facing their impending trial, they have now applied for revision.

The summary of learned counsel's arguments for the applicants is as follows. The only evidence implicating the applicants came from the respective cautioned statements of the two accused not before the court. Since these statements were exculpating to the makers, they did not amount to confessions, and section 30 of the Evidence Act which permits a confession of co-accused to be considered against another co-accused would not be applicable. Even if they were confessions and the said section 30 applied, he argued further that on the authority of *Public Prosecutor* v. *Nordin bin Johan*[1], there was no *prima facie* case for the applicants to be committed for trial.

The gist of the learned Deputy's arguments is that a cautioned statement would form part of the prosecution case and could therefore be considered. He cited *Lim Yow Choon* v. *Public Prosecutor*[2]. The weight of prosecution evidence was for the jury and not the committing magistrate to consider, and he cited *In re Pang Po Pah*[3]. Apart from the cautioned statements, the first applicant was identified by the 8th deponent in the preliminary enquiry. He agreed with the view expressed by the inquiring magistrate in his grounds of judgment in connection with the earlier appeal that the burden of proof on the prosecution was lower than that in a summary trial.

I will set out the relevant portions of sections 139, 140 and 141 of the Criminal Procedure Code (C.P.C.):-

"139. (i) When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for."

"140. (i) When the evidence referred to in the last preceding section has been taken the Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him, unless it appears to the Magistrate that such person should be tried before himself or before some other Magistrate in which case he shall either –

(a) forthwith frame a charge or charges in writing and call upon the accused to plead thereto; or

(b) order the accused to be tried before some other Magistrate."

"141. (i) If after taking the evidence for the prosecution the Magistrate is of opinion that on the evidence as it stands there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence or offences the accused is charged."

In *Pang Po Pah's* case, Wan Yahya J., *inter alia*, said,

". . . Once the bare ingredients of any offence triable by the Court of a Judge has been presented to him, his duty is to make the order of committal and not usurp the more intricate duty of assessing the credibility of facts from the body so authorised to perform that function, i.e., the jury."

It was held in *Re Osman bin Abdullah*[4] that the task of resolving any real doubt as to the weight and quality of evidence and assessing the evidence should be left to the Court of a Judge, it not being part of the inquiring magistrate's duty to consider possible lines of defence.

In *Nordin* case, the evidence against Nordin came also from a cautioned statement of another co-accused and the learned trial Judge, but for such cautioned statement, was unable to say from the rest of the evidence that he was led to the irresistible conclusion that Nordin was at the scene of crime and participated in it. He then acquitted the accused without calling for his defence. On appeal to the Federal Court the order of acquittal was upheld and Raja Azlan Shah. L.P., (as he then was), delivering the judgment of the Court held:-

". . . We are satisfied that the evidence against the 2 respondents, apart from the 3rd accused's confession, was not sufficient to satisfy the requirements of the charge against them and that calling on their defence would on the authorities not only go beyond taking into consideration the 3rd accused's statement but be tantamount to virtually relying

on it to an extent that would not be permissible for the purposes of section 30 of the Evidence Act."

It is settled that an inquiring magistrate does not determine the guilt or innocence of a person in a preliminary enquiry. In my view, the words, "sufficient grounds for committing the accused person for trial" do not postulate that the prosecution must have either established a case beyond a reasonable doubt or a *prima facie* case where the words "*prima facie* case" are used interchangeably with the expression of a case proved beyond reasonable doubt. The words, *viz.* "sufficient grounds for committing the accused for trial" mean in my view that there is credible evidence, which, if believed, subject to all possible lines of defence, may result in a conviction. Credible evidence, in this context, does not mean evidence of a witness whose credibility has been established, but means, instead, evidence which is not inherently improbable not for example, that incredible story of a witness seeing a cow jump across the moon. I have used the word "may" in saying that such evidence may result in a conviction, in contradistinction to the case proved beyond a reasonable doubt which must, of course, end in a conviction. It can be easily appreciated that before such credible evidence is believed, the reality of a trial or summary trial being such, and bearing in mind that a preliminary enquiry is no trial at all, there will be all the possible lines of defence which will render such evidence eventually unacceptable or excusable from the point of view of criminal liability and one of such defences may, for example, be that the evidence is not cogent enough on account of one reason or another. To epitomize, therefore, my view is, if there is credible evidence, which, if believed but subject to all possible lines of defence, may end in a conviction, in the sense I have set out above, the inquiring magistrate shall have no option but to commit for trial the accused person.

I am fortified in my view by what follows. First, the authorities mentioned above in connection with the duty of an inquiring magistrate all indicate that the enquiring magistrate has no right to determine guilt rightly so, otherwise he will usurp the functions of Judge and jury. Secondly, the words, "sufficient grounds for committing the accused for trial" were made by the legislature intentionally different from the corresponding words used in section 173 of the C.P.C. in connection with a summary trial or section 214 (i) of C.P.C. in relation to a trial before the jury and Judge. Thirdly, under sections 381 to 386 of the C.P.C. the Public Prosecutor may, after seeing the record of a preliminary enquiry, direct that the accused be discharged or that further evidence be taken before the inquiring magistrate. All these sections would tend to suggest that an order of committal does not denote a case proved beyond a reasonable doubt.

The finding of "a *prima facie* case" was relied on by learned counsel for the applicants herein as a prerequisite for the inquiring magistrate to make the order of committal for trial. I do not think that he realised sufficiently that this submission was based on fairly shifting ground. The expression, "*prima facie* case" has been variously equated either with a prosecution case proved beyond a reasonable doubt at the end of the prosecution case in any criminal trial or with the totality of evidence that is less than that at the same stage; the former position appeared to have gained ascendency over the latter conclusively because of the decision in the former F.M. Court of Appeal case of *Soo Sing & Two Ors.* v. *Public Prosecutor*[5], followed, for example, by the judgment of Wan Suleiman F.J. in the case of *Tan Ah Ting* v. *Public Prosecutor*[6], until the arrival of the upheaval in the case of *Haw Tua Tau* v. *Public Prosecutor*[7] I do not think I ought to deal more with the meaning of the expression "*prima facie* case" as my judgment is not much dependent, in strictness, on it, but it is interesting to observe that the view that this expression of a *prima facie* case is equivalent to a case proved beyond a reasonable doubt at the end of the prosecution case or the view that the duty of the prosecution is to prove beyond a reasonable doubt at the end of the prosecution case, appears to have been resurrected by the Federal Court in the *Nordin case* by the clearest of implication; for the Federal Court was perfectly aware of, and in fact had referred to the learned trial Judge's evaluation of the evidence or assessing of the credibility or weight of the evidence before the trial court, when the Federal Court upheld the learned trial Judge's order of acquittal at the end of the prosecution case. It is crystal clear that the learned trial Judge could not have made an order of acquittal on any ground other than the ground that the prosecution in the *Nordin case* had not established a case beyond a reasonable doubt.

Applying my own view of the nature of evidence in a preliminary enquiry, as set out above, the evidence of the cautioned statements of the two accused not before the court, is credible evidence *i.e.* evidence which is not inherently improbable, which, if believed, and subject to all possible lines of defence, including one of frailty

of such evidence, may result in a conviction. I am conscious of the argument that on the present state of evidence, providing there is no further evidence in the trial proper later, the trial could result in an order of acquittal, thereby making the current incarceration of the applicants unnecessary but this unhappy situation could have been ameliorated of course by having a speedy trial as far as circumstances would permit, or even by a change in the law making the offence of murder a bailable offence, but such a change is a matter of policy within the province of Parliament. If an inquiring magistrate does not determine guilt or innocence, and the expression, *viz.*, "sufficient grounds for committing the accused for trial" does not denote a case proved beyond a reasonable doubt, then this reasoning would have to be carried to its logical conclusion, leading to my view as explained above, so that at least for the time being, all the accused persons in different preliminary enquiries may feel the impact of this court's ruling equally or impartially, as far as possible.

The order of committal for trial is again confirmed.

Order accordingly.

Solicitors : *J. Nadchatiram.*

DENAH BINTI DAIM & ORS. v. RUBBER INDUSTRY SMALLHOLDERS DEVELOPMENT AUTHORITY

[O.C.J. (Siti Norma Yaakob J.) February 28, 1985]

[Kuala Lumpur – Civil Suit No. 557 of 1979]

Rubber Replanting Scheme – Claim for damages against RISDA for failing in their obligations – RISDA agent for smallholders – No proof of breach of statutory duty or negligence.

In this case the plaintiffs who were smallholders of rubber land grouped themselves to take advantage of a replanting scheme introduced by RISDA, the defendant. The plaintiffs transferred all their rights and obligations of their grants to the defendant. The defendant entered into agreements with contractors to develop the land but the contractors were unsuccessful as they were hampered by goats and buffaloes who came to the area and destroyed the young rubber trees and also by failure of co-operation on the part of the plaintiffs. Subsequently the defendant took the task of doing rehabilation work but this also failed. The plaintiffs thereupon brought an action for damages against the defendant for failing in their obligations to replant their smallholdings with high yielding rubber trees.

Held: (1) in this case the defendant was acting as the agent for the plaintiffs and on the evidence the defendant had not been negligent in carrying out its duties;

(2) the evidence did not support the contentions of the plaintiffs that the defendant has committed a breach of its statutory duties or was guilty of negligence.

CIVIL SUIT.

S.T. Gamany for the plaintiffs.

Raja Abdul Aziz Addruse (*K.T Joseph* with him) for the defendant.

Cur. Adv. Vult.

Siti Norma Yaakob J. : The 20 plaintiffs in this suit are smallholders who had grouped together to take advantage of a replanting scheme that was then being introduced by the defendant for the first time in Sungai Nilam, Ulu Selangor where their smallholdings are situated. Their participation in the scheme started when they complained to the Selangor Menteri Besar who visited the area in 1972 that their smallholdings were not yielding enough rubber to guarantee them a livelihood and they sought his assistance as to the best way to remedy the situation. Under his good offices, the defendant was approached to assist them in developing their smallholdings under a scheme known as Scheme No.5 of the Rubber Industry Replanting Scheme. Under this group replanting scheme, various advantages can be derived by both the smallholders and the defendants, namely

(1) it can be done at lower costs.

(2) it is easier for the defendant to transfer technology to a group of people.

(3) it is easier for the defendant to supply planting materials to a group at a particular time.

(4) it is easier for the defendant to provide extension work for the good upkeep of the trees.

(5) the area under the scheme will be tappable at the same time, and

(6) it is easier for the defendant to give advice on proper tapping, proper processing and proper sales of rubber.

The scheme that is published as Legal Notification No.208 of 1971 is available only to the smallholder who owns 5 acres or less of rubber land but he must apply individually to the defen-